INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	9
Appendix	10

CITATIONS

Cases:

Boutilier v. *Immigration and Naturalization Service*, 387 U.S. 118	7
Bugajewitz v. *Adams*, 228 U.S. 585	8
Burdick v. *United States*, 236 U.S. 79	6, 7
Carlesi v. *New York*, 233 U.S. 51	6, 7
de la Cruz-Martinez v. *Immigration and Naturalization Service*, 404 F. 2d 1198, certiorari denied April 1, 1969, No. 1490 Misc	8
Fong Yue Ting v. *United States*, 149 U.S. 698	7
Galvan v. *Press*, 347 U.S. 522	7
Garcia-Gonzales v. *Immigration and Naturalization Service*, 344 F. 2d 804, certiorari denied, 382 U.S. 840	8
Garland, Ex parte, 4 Wall. 333	6
Harisiades v. *Shaughnessy*, 342 U.S. 580	8
Kelly v. *Immigration and Naturalization Service*, 349 F. 2d 473, certiorari denied, 382 U.S. 932	8
Kilbourn v. *Thompson*, 103 U.S. 168	8
Mahler v. *Eby*, 264 U.S. 32	8

Cases—Continued Page

People v. *Biggs*, 9 Cal. 2d 508 7
People v. *Hardwick*, 204 Cal. 582 6
Pino v. *Landon*, 349 U.S. 901, reversing *Pino* v. *Nicolls*, 215 F. 2d 237 5
Richards v. *United States*, 192 F. 2d 602, certiorari denied, 342 U.S. 946 6
Springer v. *Philippine Islands*, 277 U.S. 189 .. 8
United States v. *Wilson*, 7 Pet. 150 7
Woodby v. *Immigration and Naturalization Service*, 385 U.S. 276 8

Statutes:

Immigration and Nationality Act, as amended:
§ 212 (8 U.S.C. 1182) 2
§ 212(a) (8 U.S.C. 1182(a)) 3, 10
§ 212(a) (23) (8 U.S.C. 1182(a)(23)) 4, 5, 10
§ 241 (8 U.S.C. 1251) 2
§ 241(a)(1) (8 U.S.C. 1251(a)(1)) 2
§ 241(a)(4) (8 U.S.C. 1251(a)(4)) 5, 6, 10
§ 241(a)(11) (8 U.S.C. 1251(a)(11)) ... 2, 4, 5, 10
§ 241(b) (8 U.S.C. 1251(b)) 4, 5, 6, 11
§ 249 (8 U.S.C. (Supp. III) 1259) 2, 3, 4, 11

Miscellaneous:

Weihofen, *The Effect of a Pardon*, 88 U. of Pa. L. Rev. 177 (1939) 6
Williston, *Does a Pardon Blot Out Guilt?* 28 Harv. L. Rev. 647 (1915) 6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1234

KWAI CHIU YUEN, GIM WOON HUEY, A/K/A POK HUEY, A/K/A ROBERT HUEY, A/K/A FOOK YEN LOCK, AND HEUNG LEE, A/K/A SAM HEUNG LEE, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. i–ix) are reported at 406 F. 2d 499, 733, and 774. The opinions of the Board of Immigration Appeals appear at Pet. App. xiii–xxv.

JURISDICTION

The judgment of the court of appeals in the case of petitioner Yuen (Pet. App. x) was entered on

January 16, 1969. The judgments in the cases of petitioners Huey and Lee (Pet. App. xi, xii) were entered on January 14, 1969. The petition for a writ of certiorari was filed on April 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien who has been convicted of a narcotics offense is deportable under Section 241 of the Immigration and Nationality Act, notwithstanding his receipt of a full and unconditional gubernatorial pardon.

2. Whether the provision of Section 241(b) of the Act that a pardon for a narcotics offense does not affect the alien's deportability therefor is constitutional.

STATUTES INVOLVED

The pertinent provisions of Sections 212, 241, and 249 of the Immigration and Nationality Act, as amended (8 U.S.C. 1182, 1251, and 1259), are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

Petitioners are natives and citizens of China who have been ordered deported—Yuen and Lee pursuant to Section 241(a)(11) of the Immigration and Nationality Act (Appendix, *infra,* pp. 10–11) on the basis of convictions for narcotics offenses, and Huey pursuant to Section 241(a)(1) (8 U.S.C. 1251(a)(1)) on the ground that he was inadmissible at the time of his entry (Pet. App. xiii-xiv, xviii-xix, xxi-xxii; Huey

R. 25–29).[1] All three convictions were in the California state courts,[2] and each petitioner has been granted a full and unconditional pardon for his offense by the Governor of California (Pet. App. xiv-xv, xix-xx, xxii).[3] In each case the petitioner, after the entry of the deportation order, moved to reopen the proceedings for the purpose of seeking relief under Section 249 of the Act (Appendix, *infra,* pp. 11–12). That section grants the Attorney General discretionary authority to create a record of lawful admission for permanent residence in the case of any alien who entered the United States prior to June 30, 1948, provided no such record is otherwise available and the alien is not excludable under Section 212(a) of the Act (8 U.S.C. 1182(a)) insofar as that section relates, *inter alia,* to "violators of the narcotic laws" (Pet. App. xiv, xix-xx, xxii; Huey R. 7). Petitioners contended in their motions that their pardons precluded

---

[1] Huey entered under a false claim of United States citizenship (Pet. App. xix). He was also convicted of a narcotics offense and, while the expulsion order in his case was not based on the conviction, he is deportable on that ground as well as on the one indicated (Huey R. 90).

[2] Yuen was convicted in 1938 of selling morphine and was sentenced to six years' imprisonment. Lee and Huey were convicted in 1955 and 1949, respectively, for possessing opium and were sentenced to briefer terms of confinement (Pet. App. xiv, xix, xxii; Huey R. 90–92).

[3] Yuen's and Lee's pardons were granted after the entry of the deportation orders in their respective cases. (Lee's pardon was granted on December 23, 1963—see Lee R. 24—not December 23, 1962, as mistakenly stated in the Board of Immigration Appeals' opinion (Pet. App. xxii). Huey's pardon was granted before the entry of the expulsion order but after the commencement of the proceedings and the determination of deportability (Huey R. 87–88, 90).

using their convictions as statutory bases for excludability. In each case the Board of Immigration Appeals denied the motion to reopen—or affirmed the special inquiry officer's refusal to do so—on the ground that in consequence of his narcotics conviction the petitioner would be inadmissible under Section 212(a)(23) of the Act (Appendix, *infra*, p. 10) notwithstanding the pardon (Pet. App. xiii-xxv). The Board's conclusion that the provision in Section 241(b) making a pardon ineffective for a narcotics offender also renders him ineligible for relief under Section 249 was based on the pointlessness of a contrary interpretation; even if an alien were granted a record of lawful admission for permanent residence he would nevertheless remain immediately subject to deportation under Section 241(a)(11), which is directly controlled by Section 241(b) (Pet. App. xv-xvi, xxiv-xxv). The court of appeals affirmed (Pet. App. i-xii).

ARGUMENT

1. Petitioners do not dispute the determination by the administrative authorities and the court of appeals that if they are *deportable* (under Section 241(a)(11)) because of their narcotics convictions notwithstanding their pardons, they are by the same token *excludable* therefor (under Section 212(a)(23))—and hence ineligible for the relief authorized by Section 249. They argue, however, that a narcotics conviction as to which a pardon has been granted lacks the "finality" required to support a deportation order (Pet. 11–12). Reliance on *Pino* v. *Landon*, 349 U.S. 901 (a decision construing the Act), suggests

that the argument is that Congress cannot be supposed to have intended that an alien should be deportable by reason of a narcotics conviction where a full and unconditional pardon has been granted. But Congress has manifested with unusual clarity its intention that a pardon shall not affect deportability based on a narcotics conviction.

Section 241(a)(11)—the deportation provision corresponding to the exclusion criterion in Section 212(a)(23)—makes deportable any alien who has been convicted of a narcotics offense (Appendix, *infra*, pp. 10–11). A different deportation provision, Section 241(a)(4), provides for the expulsion of any alien who is convicted of a crime involving moral turpitude committed within five years after entry if he is sentenced therefor to a year or more in prison (Appendix, *infra*, p. 10).[4] Section 241(b) provides that the provisions of Section 241(a)(*4*) shall not apply if the alien has been granted a full and unconditional pardon for his offense by the President or a Governor, but expressly excludes from that exemption convictions rendering the alien deportable under Section 241(a)(*11*)—*i.e.*, narcotics convictions (Appendix, *infra*, p. 11). Thus Congress has explicitly manifested its purpose to make a narcotics conviction a ground of deportation irrespective of whether it has been pardoned.[5]

---

[4] Or who at *any* time after entry is convicted of two such crimes irrespective of the sentence imposed.

[5] *Pino* v. *Landon*, 349 U.S. 901 (reversing *Pino* v. *Nicolls*, 215 F. 2d 237 (C.A. 1)), involved the question whether a conviction as to which the sentence had been "revoked" by the court of conviction and the matter placed "[o]n file" (215 F. 2d

2. Petitioners also level a constitutional challenge to the direction in Section 241(b) that a pardon granted to a narcotics offender will not prevent his deportation for committing the offense. They contend this legislative policy abridges the power of executive clemency (Pet. 7–11).

a. For this proposition, petitioners rely on the broad dictum of *Ex parte Garland,* 4 Wall. 333, 380, to the effect that a full pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence" (Pet. 9–10).[6] The *decisions* of this Court and the lower courts, however, make clear that neither the fact nor the record of guilt is expunged or obliterated by a pardon. See, *e.g., Carlesi* v. *New York,* 233 U.S. 51 (offense pardoned by the President may properly be taken into account in sentencing under state multiple-offender statutes); *Burdick* v. *United States,* 236 U.S. 79, 94 (a pardon must be accepted to be effective, for the reason, among others, that a pardon "carries an imputation of guilt" which the recipient, in accepting, acknowledges); *Richards* v. *United States,* 192 F. 2d 602, 605–608 (C.A.D.C.), certiorari denied, 342 U.S. 946 (pardoned offense may be used to impeach credibility); *People* v. *Hardwick,*

---

at 241) had attained sufficient finality to serve as a basis for deportation within the contemplation of Section 241(a)(4). The pardon provisions of Section 241(b) were not involved. Petitioners' reliance on the decision is consequently mistaken.

[6] That the statement was dictum was noted in *Richards* v. *United States,* 192 F. 2d 602, 607 (C.A.D.C.), certiorari denied, 342 U.S. 946, as well as in Weihofen, *The Effect of a Pardon,* 88 U. of Pa. L. Rev. 177, 181, 189 (1939). See, also, Williston, *Does a Pardon Blot Out Guilt?* 28 Harv. L. Rev. 647 (1915).

204 Cal. 582, 588–589 (same); *People* v. *Biggs*, 9 Cal. 2d 508 (same as *Carlesi* v. *New York, supra*, except that the pardoned convictions were those of a sister state). A pardon, in short, "exempts * * * from the punishment the law inflicts for a crime" (*United States* v. *Wilson*, 7 Pet. 150, 160; *Burdick* v. *United States, supra*, 236 U.S. at 89–90), but leaves unaffected the fact of guilt and indeed ordinarily assumes it.[7] As observed in *People* v. *Biggs, supra*, 9 Cal. 2d at 511,

> [A] pardon exempts the individual from the punishment which the law inflicts for the crime which he has committed; and generally speaking, it also removes any disqualifications or disabilities which would ordinarily have followed from the conviction. To say, however, that the offender is "a new man", and "as innocent as if he had never committed the offense", is to ignore the difference between the crime and the criminal. A person adjudged guilty of an offense is a convicted criminal, though pardoned * * *.

In light of the broad power of Congress to specify which classes of aliens shall be allowed to enter this country and which shall be permitted to remain[8] and the settled rule that deportation, however severe its consequences may be to the individual involved, is

---

[7] None of the pardons involved at bar questioned the guilt of the recipient; each was explicitly rehabilitative in its terms and purposes (Yuen R. 21–22; Huey R. 87–88; Lee R. 24).

[8] *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; *Galvan* v. *Press*, 347 U.S. 522, 531; *Fong Yue Ting* v. *United States*, 149 U.S. 698.

not punishment,[9] there can be no doubt that it is within the constitutional competence of Congress to provide that aliens convicted of defined types of offenses shall be excludable or deportable regardless of a pardon. Cf. *Garcia-Gonzales* v. *Immigration and Naturalization Service*, 344 F. 2d 804 (C.A. 9), certiorari denied, 382 U.S. 840 (judicial expungement of narcotics conviction pursuant to state's rehabilitative and punishment-mitigating machinery does not affect deportability); *Kelly* v. *Immigration and Naturalization Service*, 349 F. 2d 473 (C.A. 9), certiorari denied, 382 U.S. 932 (same); *de la Cruz-Martinez* v. *Immigration and Naturalization Service*, 404 F. 2d 1198 (C.A. 9), certiorari denied April 1, 1969, No. 1490 Misc. (same).

b. In any event, as the court below observed (Pet. App. v), whatever the power of Congress to provide that a *Presidential* pardon shall not affect deportability for a defined type of offense, petitioners can not prevail here by relying on the doctrine of separation of powers. They were convicted of state offenses and received their pardons from the Governor of California. The principle of separation of powers reflects the tripartite nature of the federal government, and prevents one branch from encroaching on the functions of another (see *Kilbourn* v. *Thompson*, 103 U.S. 168, 190–191; *Springer* v. *Philippine Islands*, 277 U.S. 189, 201). This concept has no relevance in

[9] *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591.

the area of federal-state relations, where the Supremacy Clause makes the federal legislature, judiciary, and executive supreme within their spheres of competence. The Constitution commits to Congress plenary power over the admission and deportation of aliens, and its policy in cases such as these cannot be circumscribed by the acts of state officials.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

MAY 1969.

APPENDIX

Sections 212, 241, and 249 of the Immigration and Nationality Act, 66 Stat. 182 *et seq.*, as amended, provide in pertinent part:

> SEC. 212 [8 U.S.C. 1182]. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * *;
>
> * * * * *
>
> SEC. 241 [8 U.S.C. 1251]. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation

relating to the illicit possession of or traffic in narcotic drugs or marihuana * * *;

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

* * * * *

SEC. 249 [8 U.S.C. (Supp. III) 1259]. A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the

narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 30, 1948;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

U.S. GOVERNMENT PRINTING OFFICE: 1969